UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN BANKERS ASSOCIATION et al.,	)	
Plaintiffs,	)	
v.	)	
NATIONAL CREDIT UNION ADMINISTRATION, et al.,	)	No. 96-CV-2312 (TPJ)
	)	Consolidated with No. 90-CV-2948 (TPJ)
Defendants,	)	

DEFENDANT NATIONAL CREDIT UNION ADMINISTRATION'S OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

Plaintiffs have needlessly moved for immediate, emergency relief to enjoin a policy that has been in effect for over 14 years. Plaintiffs' long delay in challenging the National Credit Union Administration's multiple group policy not only belies any claim of imminent, irreparable harm, it also completely undercuts their likelihood of prevailing upon their claim for permanent relief.

Under the doctrine of laches, equitable relief is not available to a plaintiff whose inexcusable delay in challenging an agency's policy has resulted in detrimental reliance upon the policy by others. That is the situation here. Although the NCUA's multiple group policy was adopted more than 14 years ago, plaintiffs waited until this week, when they filed this action, to seek its invalidation. In the interim, the policy has been

largely responsible for the growth of occupational credit unions, has dramatically reduced credit union failures, and is the basis for their future growth and stability. Because invalidating the policy at this late date would cause extraordinary harm to the federal credit union industry, NCUA, and the public interest, plaintiffs' claim is barred by laches, and they have no likelihood of prevailing on the merits.

Nor have plaintiffs met their fundamental burden of identifying imminent, irreparable harm. The complaint fails to allege any specific injury to plaintiffs themselves, or any of their members. In contrast, NCUA has submitted multiple declarations to the Court evidencing the extraordinary adverse impact that the sought-after relief would have on the stability and continued growth of the nation's federal credit unions.

BACKGROUND

This case arises out of a prior action, First National Bank & Trust Co., et al. v. NCUA, et al., No. 90-2948 (TPJ), in which five North Carolina banks and the American Bankers Association ("ABA") challenged the application of NCUA's "multiple group" or "select employee group" (SEG) policy to a single credit union -- AT&T Family Federal Credit Union ("ATTF"). After this Court ruled in favor of NCUA, 863 F. Supp. 9 (D.D.C. 1994), the Court of Appeals reversed. It held that NCUA's policy of permitting employee groups to join credit unions with which they do not

share a "common bond" is inconsistent with the Federal Credit Union Act's ("FCUA's") "common bond" requirement, 12 U.S.C. § 1759.[1] 90 F.3d 925 (D.C. Cir. 1996). The D.C. Circuit remanded the case "for the entry of declaratory and injunctive relief . . . concerning the NCUA's 1989 and 1990 approvals of certain applications filed by ATTF." Id. at 531.[2]

Plaintiffs then filed a motion in this Court for "immediate enforcement of the mandate." Although the mandate, as well as their amended complaint, was limited to ATTF, plaintiffs sought to enjoin the addition of new employee groups to any federal credit union under the multiple group policy, and to prevent credit unions from accepting new members from groups added previously. In response, NCUA and the intervenors pointed out that plaintiffs were not entitled to such relief, and asked the Court to stay consideration of appropriate relief while they pursued their appellate remedies. See Defendant NCUA's Opposition To Plaintiffs' Motion For Immediate Enforcement Of The

[1] 12 U.S.C. § 1759 provides that "Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district."

[2] The case was remanded on August 16, 1996, after plaintiffs filed a motion in the Court of Appeals for immediate prospective relief or, in the alternative, for immediate issuance of the mandate. Motions by NCUA and intervenors ATTF and Credit Union National Association ("CUNA") to recall the mandate were denied on September 9, 1996.

Mandate; Intervenors' Opposition To Banks' Motion For Immediate Relief (filed September 9, 1996).

NCUA and the intervenors subsequently filed petitions for rehearing and suggestions for rehearing en banc in the Court of Appeals. See Notice of Filing (September 26, 1996), attachment 1. "Upon consideration" of the petitions, the Court of Appeals ordered plaintiffs-appellants to respond on October 4, 1996. Id., attachment 2.

Meanwhile, at a status hearing on September 27, 1996, this Court directed the government to inform it of what NCUA was prepared to do voluntarily to comply with the D.C. Circuit's mandate while the rehearing petitions were pending. At a second status hearing on October 4, 1996, NCUA stated that it was willing to voluntarily suspend the approval of applications to add new employee groups to ATTF under the select employee group policy, and requested that the Court stay further consideration of appropriate relief on that basis.

Plaintiff ABA, not satisfied with NCUA's willingness to comply with the mandate, announced at the second status hearing its intention to file a new complaint that day. This new complaint seeks a nationwide injunction to: (1) prevent any credit union from adding new employee groups to its field of membership under the NCUA's multiple group policy; (2) prevent any credit union from accepting new members from existing

employee groups added previously under the policy; and (3) expel all members of such groups from their credit unions. See Complaint at 6.

This Court indicated that the two cases would be consolidated and that the intervenors in the first case would be permitted to intervene in the new case. A hearing on plaintiffs' motion for a temporary restraining order is scheduled for October 9, 1996.

ARGUMENT

I. PLAINTIFFS ARE NOT ENTITLED TO EMERGENCY RELIEF.

In their motion for a temporary restraining order or preliminary injunction, plaintiffs ask this Court to immediately (1) enjoin NCUA from "approving amendments to occupational feeral credit union charters that would allow credit union charters that would allow credit unions to offer membership or services to occupational groups whose members share no common bond of occupation with all other members of the credit union;" and (2) order NCUA "to advise all federal credit unions that they may not enroll new members who do not share a common occupational bond with all the other members of the credit union." Plaintiffs' proposed orders.

Emergency relief is "a drastic and unusual judicial measure," Marine Transport Lines, Inc. v. Lehman, 623 F. Supp. 330, 334 (D.D.C. 1985), and plaintiffs have failed to demonstrate

any of the elements necessary to obtain it: (1) that they have a substantial likelihood of establishing their entitlement to permanent relief; (2) that they will suffer irreparable injury if temporary relief is not granted; (3) that an injunction would not substantially harm other interested parties; and (4) that an injunction would not significantly harm the public interest. See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

A. Plaintiffs Have No Substantial Likelihood Of Obtaining The Extraordinary Relief They Seek, Because Their Claim Is Barred By Laches.

The laches doctrine reflects the principle that "equity aids the vigilant, not those who slumber on their rights." Gull Airborne Instruments, Inc. v. Weinberger, 694 F.2d 838, 843 (D.C. Cir. 1982). Under this doctrine, an otherwise meritorious suit must be dismissed if (1) there has been unreasonable delay in bringing the claim for relief, and (2) that delay has caused prejudice. Independent Bankers Assn. of America v. Heimann, 627 F.2d 486, 488 (D.C. Cir. 1980) (per curiam). If only a short period of time elapses between accrual of the claim and suit, the magnitude of prejudice required before suit would be barred is great; if the delay is lengthy, a lesser showing of prejudice is required. Gull Airborne, 694 F.2d at 843.

The facts of Heimann parallel closely those presented here. In that case, plaintiff IBAA challenged an interpretive ruling

of the Comptroller of the Currency declaring that loan production offices (LPO's) were not bank "branches" within the meaning of the National Bank Act, and therefore not subject to state branching laws. The district court entered an order declaring the Comptroller's ruling incorrect, ordering him to rescind the ruling and to refrain from further implementation of it. See 627 F.2d at 487. On appeal, the D.C. Circuit reversed, holding that "the district court abused its discretion in not ruling that laches barred IBAA's request for relief." Id. at 488.

The Court of Appeals found, first, that IBAA had waited twelve years after the policy was announced to challenge it, which amounted to unreasonable delay:

> Some delay might be understandable had the plaintiff been a single bank isolated from the country's financial centers: it might have been unaware of the effect this ruling someday could have on its business. IBAA, however, is a trade association, quite likely to be familiar with trends in the banking industry, including sophisticated loan production techniques, and charged by its members with anticipating the impact of government rulings in the banking area.

Id.

The Court of Appeals found the second element of laches -- prejudice resulting from the unreasonable delay -- was also present. "During the period IBAA delayed, some national banks made substantial financial commitments in opening LPO's that meet the ruling's requirements." Id. The Court stated that, "even

assuming arguendo" that the LPO policy was invalid, "IBAA could have prevented a large part of the banks' investment in such facilities simply by having brought this action earlier." Id. Accordingly, **and without even reaching the underlying question of the validity of the Comptroller's interpretive ruling**, the D.C. Circuit reversed and remanded with instructions that this Court "vacate its order [granting declaratory and injunctive relief] and dismiss the complaint." Id. See also National Association of Life Underwriters v. Clarke, 736 F. Supp. 1162, 1165 n.11 (D.D.C. 1990), aff'd, 997 F.2d 958 (D.C. Cir. 1993) ("After 23 years of silence," plaintiffs' challenge to Comptroller of the Currency's legal interpretation was barred by laches).

The parallels between Heimann and the present case are striking. First, plaintiffs have inexcusably delayed by waiting more than fourteen years after NCUA's multiple group policy was promulgated in 1982 to seek its invalidation.[3] NCUA announced

[3] The suit filed in 1990 by five North Carolina Banks and the ABA did not seek to invalidate the policy generally, but instead sought relief only with regard to certain charter amendments adding employee groups to a single credit union, ATTF. Indeed, the ABA participated in that case specifically on behalf of its members who "operate in all markets served by AT&T Family." Amended Complaint ¶ 9. That case therefore gave no fair warning of any intent to pursue a facial challenge to the policy. Moreover, the 1990 case was filed more than eight years after the 1992 policy went into effect, which itself constitutes unreasonable delay. See Stone v. Williams, 873 F.2d 620, 624-25 (2d Cir. 1989) (five-year delay in bringing claim held to be unreasonable). In any event, given the substantial prejudice faced by federal credit unions due to their reliance upon the

this policy in the Federal Register on April 20, 1982, 47 Fed. Reg. 16775, thereby giving plaintiffs constructive, if not actual, notice of it. See Industrial Union Dept. v. Bingham, 570 F.2d 965, 971 (D.C. Cir. 1977).

Plaintiffs cannot plausibly claim to have been ignorant of the policy's implications. What the Court of Appeals said about the IBAA in Heimann is no less true of its two co-plaintiffs here: all three are "charged by [their] members with anticipating the impact of government rulings in the banking area." 627 F.2d at 488. Accordingly, there is no reason why plaintiffs could not have challenged the policy long ago. As one court has stated, "[a] point arrives when a plaintiff must either assert [its] rights or lose them." Stone, 873 F.2d at 625. That point, for plaintiffs, has long since passed.

Second, and most importantly, plaintiffs' delay in bringing a facial challenge to the multiple group policy has greatly prejudiced the credit union industry. Since its announcement in 1982, this policy has been the driving force behind the growth and stability of occupational credit unions. Second Declaration of David M. Marquis, Director of the NCUA Office of Examination and Insurance, ¶ 5. As of September 23, 1996, there were over

(..continued)
policy, even a relatively short period of delay would give rise to laches. Gull Airborne, 694 F.2d at 843.

3,500 federal credit unions containing nearly 157,000 employee groups with millions of members. Id.

In reliance upon the longstanding multiple group policy, numerous credit unions have invested substantial sums to create an infrastructure to support employee groups and their further growth. Id. ¶ 7. They have spent millions of dollars on branch offices, data processing, personnel, and other enhancements to service the current and anticipated members of employee groups added under the policy.[4] Id. To paraphrase the D.C. Circuit in Heimann, plaintiffs "could have prevented a large part of the

[4] See Declaration of Patricia White, ¶ 6 (**80% of Family 1 FCU's operating budget of $750,000 and $250,000 in fixed assets dedicated to serving SEG members**); Declaration of Rosemary Helgeson, ¶ 6 (**55% of Tiger FCU's operating expenses and $1.1 million in fixed assets dedicated to serving SEG members**); Declaration of Stephen R. Punch, ¶ 6 (**40% of 1st City Savings FCU's $10 million operating budget and $9 million in fixed assets dedicated to serving SEG members**); Declaration of Monica I. Lopez, ¶ 6 (**75% of Longbeach Coastline FCU's and $1.9 million in fixed assets devoted to serving SEG members**); Declaration of Errol A. Griffin, ¶ 6 (**60 % of Orange County FCU's $12 million operating budget and $2.7 million in fixed assets dedicated to serving SEG members**) Declaration of David M. Styler, ¶ 6 (**70% of Southland Civil FCU's $3.8 million operating budget and $1.2 million in fixed assets dedicated to serving SEG members**); Declaration of Penelope Fulton, ¶ 6 (**80% of Kern Schools FCU's $20 million operating budget and $17.5 million in fixed assets dedicated to serving SEG members**); Declaration of Charles L. Dawes, ¶ 6 (**95% of Yolo FCU's $2.7 million dollar operating budget and $1.8 million in fixed assets dedicated to serving SEG members**); Declaration of Marla K. Shepard, ¶ 6 (**20% of Santel FCU's $5.8 million operating budget dedicated to serving SEG members**); Declaration of Linda S. Hannick, ¶ 6 (**80% of Marquardt San Fernando Valley FCU's $600,000 operating budget and $57,000 in fixed assets dedicated to serving SEG members**).

[credit unions'] investment in such facilities simply by having brought this action earlier." 627 F.2d at 488. "Equity will not protect a party that through years of silence has created an impression of acquiescence that has led to others to make substantial financial commitments." Id.

The injunction plaintiffs seek would instantly render the credit unions' substantial financial commitments to its employee groups practically wortheless. The credit unions would no longer be able to grow or even maintain their size by adding new employee groups, and their existing groups would be expelled from membership. "This will cause failures and the need for assisted mergers which will greatly impact the [federal credit union insurance fund] and the financial health of the entire industry." Second Marquis Decl. ¶ 7. Such a result is, again quoting Heimann, "hardly in line with the public interest." 627 F.2d at 488. See, e.g., Declaration of Charles L. Dawes, President/CEO of Yolo Credit Union ¶ 8b. ("the Credit Union has invested substantial capital and resources in its SEG membership. If new members under existing SEGs are not permitted or if new SEG additions are not permitted, our substantial investment will be wasted and the continuing financial impact will be devastating").

In sum, the NCUA's multiple group policy has been largely responsible for the growth and stability of occupational credit unions in the last 14 years, and is the basis for their future

growth and stability. Plaintiffs, without reason or justification, have waited until now to challenge the policy, resulting in a situation where the policy cannot be invalidated without causing serious harm to the thousands of credit unions that rely upon it. As the Second Circuit has explained, "the availability of the laches defense represents a conclusion that the societal interest in a correct decision can be outweighed by the disruption its tardy filing would cause." Stone, 873 F.2d at 626. Because of the massive disruption to the credit union industry that would ensue if plaintiffs' request for relief is granted, and because such disruption is directly attributable to plaintiffs' long delay in seeking that relief, plaintiffs' claim is barred by laches and they have no likelihood of prevailing on the merits.[5]

B. Plaintiffs Have Made No Showing Of Any Concrete, Immediate and Irreparable Harm.

Plaintiffs have failed completely to meet their burden of demonstrating concrete, immediate and irreparable harm. They have not identified a single member bank being injured by the

[5] Dismissal of the complaint on the basis of laches would not, by itself, preclude future challenges to the application of the multiple group policy by other parties. See Heimann, 627 F.2d at 489 fn. ("Because we dispose of this case on the ground that IBAA, as an organization, was guilty of laches, we do not believe that we in any way are hindering individual banks, even if IBAA members, from seeking redress with the Comptroller or, if necessary, the courts . . . .").

multiple group policy.[6] Their "showing" of harm consists of nothing more than the broad, conclusory assertion that the multiple group policy subjects them to "unlawful competition." Pl. Memo. at 8. Even assuming that some customers have left banks to join credit unions, there is no evidence that they constitute a substantial number or that such "competition" has a significant, adverse impact upon any individual bank, let alone the banking industry at large.

Indeed, the evidence is to the contrary, since the employee groups joining credit unions tend to be small businesses whose employees earn low wages and have difficulty obtaining credit. See, e.g., Declaration of Marcus Schaefer, President of ATTF (filed in C.A. No. 90-2948) ¶ 5 ("Many individuals in the Asheboro area would be forced to seek credit from finance companies (or would not be able to obtain credit from a financial institution at all) but for the fact that they are employed by a company sponsoring a SEG affiliated with ATTF. Their income levels are too low to make them good candidates for banks.").

In any event, the allegedly "unlawful competition" has been ongoing ever since the multiple group policy was adopted in 1982. Given that they waited over 14 years to file this complaint, and that no party to the prior action sought emergency relief during

[6] Indeed, the complaint is so lacking in any identification of alleged injury that plaintiffs' Article III standing is questionable.

the six years that case has been pending, plaintiffs' sudden, asserted need for immediate relief cannot be taken seriously.

C. The Requested Injunction Would Cause Substantial Harm To Interested Parties And The Public Interest.

1. Injunction against new groups

While the benefit of a preliminary injunction to plaintiffs' member banks is diffuse and speculative at best, the potential harm to NCUA, the credit union industry, and the general public is enormous. NCUA's multiple group policy has substantially reduced credit union failures by allowing credit unions to diversify their membership base beyond the employees of a single business, manufacturing plant, or military facility, making them far less vulnerable to economic changes. Declaration of David M. Marquis (filed September 13, 1996 in C.A. No. 90-2948) ¶¶ 4-5. This ability to diversity has strengthened credit unions and reduced losses to the National Credit Union Share Insurance Fund, which insures credit union depositors up to $100,000. Second Marquis Decl. ¶ 4.[7]

The numbers reflecting the reduced failures are dramatic. In 1981, there were 222 federal credit union failures

[7] See, e.g. Affidavit of Ronald L. Tomlinson (filed in C.A. No. 90-2948) ¶ 14 ("If GE EFCU had not been able to add SEGs in the 1980s, GE EFCU would have been forced to liquidate after the Company reduced its workforce in the 1990s below the level at which it is feasible to service a membership base").

respectively. Second Marquis Decl. ¶ 9. In 1982, the year the multiple group policy was adopted, there were 112 failures. In 1983, the first full year of the policy, the number of failures plummeted to 40. Id. The number has steadily declined since then, despite changing economic conditions, falling to just 8 in 1995. Id. ¶¶ 8-9. Because of the reduced failures, there were fewer losses to the Insurance Fund. Id. ¶ 8.

By preventing credit unions from adding new employee groups to their field of membership, the requested injunction would likely increase credit union failures and the corresponding cost to the Insurance Fund. For example, in NCUA's Region III, which encompasses 10 southeastern states, Puerto Rico and the U.S. Virgin Islands, there are at least 9 credit unions where the primary sponsoring employer has either closed, is substantially reducing its workforce, or has been sold. Declaration of Timothy P. Hornbrook, Associate Regional Director for Programs, ¶ 4. These institutions currently have 70,200 members and $343 million in total assets. Id. They must diversify their membership base immediately in order to survive, and will be unable to do so if the Court enjoins NCUA from approving expansions under the multiple group policy. Id.

2. Injunction against new members from groups added previously

Plaintiffs also want to enjoin NCUA from allowing credit unions to enroll new members from employee groups added previously under the multiple group policy. Such an injunction would directly and substantially harm those new members by preventing them from exercising their right to join a credit union for which they are eligible by virtue of their employment. The right to join a credit union is a significant employee benefit. See, e.g., Affidavit of Gail Briles, Industrial Relations Manager for Klaussner Furniture Industries, Inc. (filed in C.A. No. 90-2948) ¶ 7 (credit union membership "is one of the most inexpensive and popular benefits Klaussner offers its employees"). Plaintiffs' requested injunction would abrogate that right for untold thousands of people.

Such an injunction would also cause serious harm to the credit unions themselves by preventing them from continuing to serve their existing employee groups. Employee groups whose new members are unable to join a credit union will eventually withdraw their credit union support, such as processing payroll deduction deposits for their employees. See White Decl. ¶ 8a. This will lead to reduced deposits and loan opportunities, which will weaken the credit unions' financial condition. Id. Even those groups that do not initially withdraw their support will, as the employee pool turns over, grow less and less interested in supporting the credit union as fewer and fewer of their employees

will remain credit union members. Id. Eventually, credit unions will lose their groups entirely and their financial condition will deteriorate. Second Marquis Decl. ¶ 6.

In any event, NCUA has no authority "to advise all federal credit unions that they may not enroll new members who do not share a common occupational bond with all the other members of the credit union." Plaintiffs' proposed orders. Once NCUA approves the addition of an employee group to a credit union's field of membership, it cannot, short of revoking that approval entirely, prevent members of the group from joining the credit union. Such revocation would effectively divest the group from the credit union and would significantly alter the status quo, not preserve it.

The language of plaintiffs' proposed order is also overbroad, for two reasons. First, it would encompass members of groups for which applications were approved by NCUA more than six years before the case was filed, which is beyond the applicable statute of limitations, 28 U.S.C. § 2401(a). Second, by requiring new members to share a common bond with all other members, it would prevent a credit union from accepting any new members until it was divested of all those who were previously added under the policy, even if the new members share a common bond with the credit union's core membership. However, the FCUA speaks not in terms of members having a common bond, but groups.

See n.1, supra. And under the Court of Appeals' reasoning, if an employee group shares a common bond with a credit union's core membership group, then there is no reason to stop members of the employee group from joining the credit union.

II. ANY INJUNCTION ISSUED SHOULD BE LIMITED TO THIS CIRCUIT.

The principle of comity requires federal district courts to exercise care to avoid interfering with each other's affairs. Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180 (1952). Even if an injunction were appropriate, comity interests would strongly favor that it be limited to this circuit, so as to avoid interfering with the judgment of another district court that last year upheld the NCUA's multiple group policy in a challenge to its application to a Tennesee credit union. First City Bank v. NCUA, 897 F. Supp. 1042 (M.D. Tenn. 1995). Such restraint would also respect the Sixth Circuit's ability to render a meaningful decision in the appeal of that case, which is scheduled to be argued on October 15, 1996.

"When an injunction sought in one federal proceeding would interfere with another federal proceeding, considerations of comity require more than the usual measure of restraint, and such injunctions should be granted only in the most unusual cases." Common Cause v. Judicial Ethics Committee, 473 F. Supp. 1251,

1253-54 (D.D.C. 1979) (quoting Bergh v. State of Washington, 535 F.2d 505, 507 (9th Cir. 1976). By limiting any relief to this Circuit, the Court will avoid the problems that would result if NCUA were exposed to the conflicting mandates of two circuits. See American Federation of Gov. Employees v. Weinberger, 651 F. Supp. 726 (S.D. Ga. 1986) (court invoked comity principles to narrow the relief sought by plaintiffs so as to avoid imposing its judgment in the District of Columbia).

Moreover, when an agency's position is rejected in one circuit, "it should have a reasonable opportunity to persuade other circuits to reach a contrary conclusion." Johnson v. U.S. R.R. Retirement Bd, 969 F.2d 1082, 1093 (D.C. Cir. 1992). The limitation of relief to this circuit would permit NCUA such a "reasonable opportunity" to litigate its position in other circuits. In this fashion, important legal issues are able to "'percolate' throughout the judicial system, so the Supreme Court can have the benefit of different circuit court opinions on the same subject." Id. See also Ayuda, Inc. v. Thornburgh, 880 F.2d 1325, 1330-31 (D.C. Cir. 1989) ("Even were the INS to acquiesce in an unfavorable judicial interpretation in one circuit, it would surely not be obliged to do so in other circuits that had not decided the question") vacated on other grounds, 498 U.S. 1117 (1991); Seattle Audubon Society v. Lyons, 871 F. Supp. 1291, 1313 (W.D. Wash. 1994) ("Differences among the circuits are

common, and the District of Columbia has no power to overrule another circuit's decision"), aff'd, 80 F.3d 1401 (9th Cir. 1996).

CONCLUSION

For the reasons stated, plaintiffs' motion for a temporary restraining order and preliminary injunction should be denied.

Respectfully submitted,

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